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ABSTRACT

The ancient principle of caveat emptor (let the buyer beware) is largely dead, but remnants of the rule remain in the privilege to use puffery, a type of subjective opinion claim which is defended by the law on the ground that it does not deceive the public even though it is false. While behavioral evidence suggests that many such claims actually deceive, the law relies instead on precedents descending from the heyday of caveat emptor which hold that various false statements are not deceptive. An examination of early English and American court precedents reveals that the precedents have arbitrarily and without reasonable justification determined that consumers are not deceived by puffery because they presumably know they should distrust it, do in fact distrust it, and have full opportunity to check the truth of such claims. The law's reason for legalizing puffery, in other words, is that it does not work. A comparison of the contrasting attitudes toward puffery taken by major advertisers, who would hardly use such claims if they thought that they did not work, would be valuable. In conclusion, puffery is no more justified today than would be any of the now-rejected aspects of caveat emptor which once prevailed. (Author/TO)

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THE QUESTIONABLE RATIONALE FOR ADVERTISING PUFFERY

AS REVEALED IN EARLY ENGLISH AND AMERICAN LEGAL PRECEDENTS

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THE QUESTIONABLE RATIONALE FOR ADVERTISING PUFFERY AS REVEALED IN EARLY ENGLISH AND AMERICAN LEGAL PRECEDENTS

Ivan L. Preston

The intent of this paper is to contribute to the elimination of the rule of caveat emptor in the marketplace. The ancient principle of "Let the buyer beware" holds that the recipient of a misrepresentation in a sales transaction (usually the buyer, though possibly the seller) has no legal remedy for resulting loss because he had no right to rely on the truth of the statement in the first place. To determine the truth he is required to rely solely on his own inspection of the object for sale, for to do otherwise renders him guilty of unreasonable and therefore negligent behavior which removes his right to legal recourse. He retains the right to rely on selling messages which the law holds to be warranties or unlawful misrepresentations, but a substantial proportion of the falsities employed in sales transactions do not fall into those categories.[1]

Put bluntly, caveat emptor gives the seller the right to tell lies which harm the buyer. This paper is not the place to describe the developments in social policy which have changed our attitudes toward such a privilege; suffice here to say that a right once considered desirable is now thought undesirable. Yet caveat emptor remains because the law has lagged behind society's wishes. The law clings to ancient precedents.

This paper presents a legal (not social) analysis which argues that the ancient precedents commonly cited as providing a rationale today for caveat emptor actually do no such thing. Before proceeding on this point, however, we must first render inoperable the callous canard which holds that "Caveat emptor is dead." There is no lack of authority for such a statement; George Alexander said it precisely in his

Honesty and Competition,[2] and his interpretation of conventional wisdom no doubt was based on similar emanations from high and prestigious courts. We were told by the Second Circuit in FTC v. Sterling Drug that "The central purpose of the provisions of the Federal Trade Commission Act....is in effect to abolish the rule of caveat emptor which traditionally defined rights and responsibilities in the world of commerce. That rule can no longer be relied upon as a means of rewarding fraud and deception."[3] Justice Hugo Black spoke for the U.S. Supreme Court when he said in FTC v. Standard Education Society, "The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception."[4]

In disputing the truth of these statements I must confess I am playing a bit of a game of semantics. Admittedly, caveat emptor is dead today in the sense that blatant and literal lies have been made unlawful. The trend for a hundred years or more, legally as well as socially, has clearly been toward giving the buyer the right to rely on false selling representations and to press charges against them when such reliance leads to loss. The point of this paper, however, is that caveat emptor is not entirely dead. It is merely mostly dead, and this I believe is a distinction of more than semantic importance. While caveat emptor still lives, sellers may still tell lies. They are lesser sorts of lies, and they do lesser sorts of harm. But they are still lies and still harmful, and I assume it as a given (for this paper's purpose) that social policy today considers that undesirable.

Caveat emptor's leftovers consist of lies made legal by the contemporary distinction between falsity and deception. Particularly in Federal Trade Commission practice it has been established that deception is separate from falsity, and that some falsity may be non-deceptive and some non-falsity may be deceptive. There is merit in these possibilities, but to be used properly they require that the law make a correct determination of deception, which is a behavioral concept difficult

to assess. In my belief, the principal reason why artifacts of caveat emptor remain today is because the law has determined incorrectly that a wide range of seller's false claims are non-deceptive and therefore legal. I believe behavioral evidence would show that many such claims actually are deceptive and therefore should be ruled illegal.

The law's determinations on these questions, however, are not made primarily on the basis of behavioral evidence. They are made on the basis of precedents descending directly form the heyday of caveat emptor which hold as a matter of law that various false statements are not deceptive. There is no point in invoking behavioral evidence which proves otherwise so long as the law insists that the facts are already determined by precedent. The only effective way to dispute the facts under such conditions is to meet the law on its own grounds and examine the precedents themselves to see whether they in fact provide a reasonable basis for the law's decisions.

Fortunately (from the viewpoint of those who would eliminate caveat emptor), an analysis of the precedents suggests they are highly vulnerable to question. In my judgment they do not provide the rationale for protecting falsity which they purport to provide. The bulk of what follows will be devoted to the details of the analysis which produces this conclusion.

As a generic name for all the types of falsity which the law has said are not deceptive I propose the term "puffery." I have identified five such types, all of which "puff" the product, giving it more features or more quality than it objectively possesses. Technically, "puffery" has been used in legal writings to refer only to one of these kinds,[5] which consists of subjective opinions, superlatives or exaggerations, stated vaguely and generally, and not expressing (at least not literally) any specific facts. Puffing statements must be about qualities which actually exist; they do not include statements that something exists when it does not at all.

Puffery is a sub-category of opinion and value statements which have traditionally been treated more loosely than factual statements. For the latter the elimination of the caveat emptor rule is virtually complete, but for the seller's claims we are examining here the rule largely still remains. An examination of the treatment of factual statements would provide a comparison point against which the freedom granted to the purveyors of opinion statements would become particularly apparent. Unfortunately, space requirements do not permit such examination here.[6]

The exemption of opinion and value statements began over three centuries ago. Harvey v. Young, an English case of 1602,[7] involved a seller's false statement that a "term for years" (an archaic phrase meaning an estate held for a specified number of years) "was worth 150 pounds to be sold." The buyer paid that much for it, but later could not get even 100 pounds. He went to court seeking recovery, but was thwarted to find the seller's liability denied because the claim:

> "did not prove any fraud; for it was but the defendant's bare assertion that the term was worth so much, and it was the plaintiff's folly to give credit to such assertion."

The court may or may not have approved the seller's conduct in stating the falsity; it didn't say. But it found no illegal behavior to be involved. It was a straight case of caveat emptor, calling the buyer negligent in the absence of warranty or fraudulent misrepresentation for relying on the seller's claim rather than examining the quality of the "term" for himself.

The law had established by 1602 that unlawful misrepresentation required a finding of fraud, and that fraud required proof of the defendant's conscious knowledge of his falsity.[8] Why was fraud not found in Harvey v. Young? The scanty report[9] explained only that if the seller had warranted the value the result would have been otherwise, "for the warranty given by the defendant is a matter to induce confidence and trust in the plaintiff." Apparently, then, a "bare assertion" with-

out warranty was not sufficient to induce confidence and trust (in modern terms, to permit justifiable reliance by the buyer). But the point was not elaborated, and we will never know with certainty what was meant. Perhaps the court's intention was to say the bare assertion was not to be relied upon because it was a statement of value and not of fact. We know at least that courts in later decisions chose to interpret Harvey v. Young in that way.

Another early English precedent was Baily v. Merrell, of 1615.[10] Baily agreed to transport Merrell's load of wood for a payment of 2s. 8d. per hundred pounds. Lacking scales, he accepted Merrell's statement that the wood weighed 800 pounds. The true weight was 2,000, as Baily discovered only when the burden made two of his horses collapse and die. The court told this feckless unfortunate it was his own folly to overload the horses when he could have avoided the disaster by his own initiative. The case was similar to Harvey in rejecting reliance on a "bare assertion." But it made fully clear, as Harvey did not, that the recipient of the misrepresentation was capable of checking its truth for himself. It also made clear that the rule applied even though the seller committed fraud, the fraud being innocuous because the buyer might readily (the court said) have perceived it.[11]

The next important precedent was Ekins v. Tresham, of 1663.[12] The defendant had falsely claimed the rent paid by tenants of the building he was selling was 42 pounds rather than the true figure of 32 pounds. Hauled into court, he argued that no fraud (deceit) was involved in such a statement. He cited Harvey v. Young in saying so. The court voiced its approval of the principle of Harvey, giving it support which led to its eventual widespread acceptance. It also offered an explanation of the principle as follows:

> "An action will not lie for saying, that a thing is of greater value than it is...because value consists of judgment and estimation, wherein men many times differ."

The court then interpreted the Harvey rule even further by telling why it

could not, after all, be applied to the rent statement. Rent was different because it could not be confirmed independently by the buyer, the decision said, thereby implying that the court felt a statement of value could be confirmed independently. A companion report of the same case stated the distinction similarly, saying that rent involved "certain" rather than "uncertain" amounts of money.[13] The term "fact" was not used in contrast to the term "value," but the implication in modern terms was that the rent figure was an actual fact about the property while the value figure was not. Therefore the seller could be found guilty of misrepresentation for falsifying rent even though not for speaking dishonestly about value. The case also implied that a person's evaluation of a thing can be made by no one but himself; he must rely on no other to make that judgment. Reliance on another was negligence, through which the buyer wreaked full responsibility upon himself.

The three cases we have examined may have been merely straws in the wind before 1789. The law of fraud was a liquid thing, undergoing the zigs and zags of tentative development. But in 1789 several of the strands were pulled together by the scholarship and authority of the court in Pasley v. Freeman,[14] which became the leading English case on fraud and the model for its treatment in the new American republic. It also became the first case to describe as "opinion" the kind of statements now called that. The plaintiffs in the case, planning to do business with a man called Falch, had relied to their detriment upon misrepresentations by Freeman commending Falch's credit rating. The court found Freeman's statements to be fraudulent, and also found the plaintiffs had "no means of knowing the state of Falch's credit but by an application to his neighbors." Since it was one of those neighbors who misled them, the ruling was made as in the rent case (Ekins) that the plaintiffs lacked the means to investigate the truth independently. They could not have known the truth about the fraudulent statement, and therefore were entitled to recover for the damages caused by their reliance on it.

One of the four justices, Grose, dissented. He claimed the statements about Falch's credit were not fraudulent and the plaintiffs did not lack the means to know their truth. He agreed the claims were false, but pressed the point that not all false statements were fraudulent. To illustrate, he cited Harvey, Leakins and Baily as typical of cases:

> "...where the affirmation is (what is called in some of the books) a nude assertion; such as the party deceived may exercise his own judgment upon; as where it is a matter of opinion, where he might make inquiries into the truth of the assertion, and it becomes his own fault from laches [negligence] that he is deceived."

Another justice, Buller, although holding with the majority that Freeman's statements did not fit this category, agreed that the type of assertion Grose had described was not fraudulent. Such an assertion, Buller said:

> "...was of mere matter of judgment and opinion; of a matter of which the defendant had no particular knowledge, but of which men will be of many minds, and which is often governed by whim and caprice. Judgment or opinion, in such cases, implies no knowledge."

Evaluation requires knowledge, of course, but Buller apparently meant there was nothing the seller could know which the buyer could not. The temper of the times ruled out any acknowledgment that a seller might have some "particular knowledge" which the buyer did not, nor of which there was any chance lacking that the buyer "might make inquiries." The difficulty the buyer might have in obtaining equivalent knowledge was not recognized. Stressed was possibility, not probability; the possibility of obtaining equivalent knowledge satisfied the law, and the low probability of actually doing so was ignored.

From what we have described of their judgments so far, it appears that the justices in Pasley believed opinion or value statements would not typically be spoken fraudulently. The court in Harvey had expressly said the false claim proved no fraud, and the Ekins decision supported this by defining value as a subjective

rather than objective element. Justice Grose's statement, however, included some additional comments which suggested rather confusingly that opinion statements would be legally non-fraudulent even when spoken with conscious intent to deceive.

That was a startlingly new development. Opinion statements were already less liable than factual ones to charges of fraud because conscious knowledge of falsity was difficult to charge against the maker of statements which presumably could be neither true nor false. But a speaker would certainly sometimes be aware of the falsity of his opinions, as when he exaggerated them grossly, and so the chance of being charged with fraud undoubtedly made sellers wary about using opinion or value claims recklessly.

To go further, however, to the extreme of entirely removing the possibility of charging fraud would be a wildly sellerist action, springing opinion statements far apart from factual statements in degree of liability. With fraud not a factor the seller would be permitted, as long as the buyer could examine the object of sale independently, to make opinion and value claims with utter abandon, damn the torpedos! The ratio of opinion statements to factual statements would rise, and would probably become the majority type of seller's claim.

Come to think of it, doesn't that sound like a description of today's advertising! I don't mean that contemporary ads represent the height of fraudulent selling, because the consumerist trend in the 20th Century has pared that activity down a good bit. But today's salesmanship is the way it is largely because of the release of opinion statements from the fraud rule, a release which was generated largely by the famous case of Pasley v. Freeman.

How did it happen? If conscious intent to deceive would normally produce a finding of fraud, how could Justice Grose hint otherwise? He did so by citing as a precedent Baily v. Merrell, a case which expressly condoned fraudulent misrepresentations. The finding in Baily had been that someone who could check a truth

which was "readily apparent" was responsible for doing so even in the face of receiving a fraudulent claim about it.

We will never know why Grose thought Baily was relevant to the question of opinion statements. The misrepresentation which harmed Baily was a claim that a load of wood weighed so much. It was a statement of fact, not of value. It does not seem to have been appropriately lumped together with the other cases which Grose used to illustrate "nude assertions." While claims concerning monetary value, as in Harvey, may vary among people and represent subjective judgment and no particular knowledge, the weight of wood is an objective amount which cannot vary from person to person. An estimation of weight may vary among people, but one figure must be objectively correct and the others wrong. A false claim of weight clearly is factual and involves particular knowledge. Yet Grose lumped such claims together with "nude assertions," a mistake which invited later observers to see his statement as implying that opinion statements can be spoken with fraudulent intent and yet not amount to fraud.

Justice Buller must have grasped this unlikely suggestion from Grose's words, since in his recorded opinion he objected strongly to the idea. He pointed out that Harvey did not condone fraud; neither did Ekins. If a statement was spoken fraudulently it could not possibly be a mere "bare naked lie," Buller said. But Buller did not choose specifically to refute the use of Baily as a precedent; he made no mention of the case. The other two justices mentioned Baily approvingly without commenting on the point in question. Thus the set of statements by the four justices in Pasley tended to leave the impression that Baily was a good precedent for determining the law of opinion statements.

Exaggerating this accident was the fact that Grose, in his interpretation of the opinion rule, cited not just one but two precedents which dealt with facts rather

than opinions. Along with Baily he cited a rule from Rolle's Abridgment[15] that a seller's claim was not legal fraud when it stated falsely the amount of money the seller had been offered for the goods. The amount some previous potential buyer had offered the seller is certainly related to value, but is itself an objective figure. And a claim that the offer was made is a statement of fact, involving particular knowledge. A rule covering such statements appears inappropriate as a precedent for the handling of opinion and value statements. Yet with Grose's help the Rolle's Abridgment rule was allowed to lend weight to the idea that opinion and value statements should be treated much more loosely than factual statements. In the future these two accidental precedents, and Pasley itself, were to be cited in that regard crucially. Without their help, the most extreme sellerist interpretations of the opinion rule, which legalized a great deal of lying, may never have been established.

A typical reflection of the ideas which passed from Pasley into later English law came in this statement in 1810 by Lord Ellenborough of the misrepresentation rule:

> "A seller is unquestionably liable to an action of deceit, if he fraudulently misrepresent the quality of the thing sold to be other than it is in some particulars, which the buyer has not equal means with himself of knowing; or if he do so, in such a manner as to induce the buyer to forbear making the inquiries which...he would otherwise have made."[16]

To see what this rule meant for opinion statements, we must turn it around:

> A seller is not liable to an action of deceit if he fraudulently misrepresent the quality of the thing sold to be other than it is in some particulars which the buyer has equal means of knowing... [and, presumably, with opinion statements he always has equal means of knowing].

The Ellenborough pronouncement shows how greatly influential the Pasley interpretation was in determining how opinion and value statements would be handled.

When the seller made such statements he could do so as fraudulently as he pleased, and the law did not object. In America, the Pasley influence was evident in the first case to mention the opinion rule, Justice Kent citing Justice Buller as authority on the topic.[17] Other early American cases also mentioned the matter peripherally,[18] and the first case to establish the opinion exemption specifically here was Davis v. Meeker of 1810.[19]

The seller Meeker was accused of falsely and fraudulently claiming that "he had been frequently offered, by different persons, 50 dollars for the wagon." The buyer Davis won a jury verdict, which implies that the jury felt Meeker had been aware of his falsity. But the court in reversing on appeal appears to have ruled that the deception was exempt from liability even though consciously false. It did not say so explicitly,[20] but other rulings appeared eventually which quite directly stated that opinion statements should be excused even when consciously false.

The first of these strongly sellerist rulings about opinion statements came in 1843 in Massachusetts, beginning a long and liberal recognition which made that state the great American hotbed of the great American blow-up. The court in Medbury v. Watson[21] described Pasley as "the leading case, in modern times, on the subject of false affirmations made with intent to deceive," and then used the authority of Pasley to declare:

> Hubbard, J.: "But in actions on the case for deceit, founded upon false affirmations, there has always existed the exception, that naked assertions, though known to be false, are not the ground of action, as between vendor and vendee.../S/uch assertions, though known by him to be false, and though uttered with a view to deceive, are not actionable. They are the mere affirmations of the vendor, on which the vendee cannot safely place confidence, and will not excuse his neglect in not examining for himself."[22]

In interpreting Pasley, Justice Hubbard obviously relied upon the dissenting opinion of Grose more than upon the majority opinions. Buller had objected to conscious

falsity, while Grose relied heavily on cases which explicitly condoned such behavior. Hubbard made it clear that an American court now condoned conscious falsity, too.

Hubbard also made it clear that he recognized none of the confusion inherent in the Pasley decision. His untroubled vision was accepted wholeheartedly in later cases, including one which blithely re-interpreted the Harvey case to suit modern needs. In Veasey v. Doton, of 1862,[23] another Massachusetts case, the jury found the defendant to have known his representation was false. Yet the appeals court reversed the finding of liability and said the case was "not distinguishable from Harvey..." We recall that in Harvey the finding of fraud would have brought liability whereas in Veasey it did not. If that didn't make Harvey "distinguishable," nothing could. Massachusetts apparently was most reluctant to let history interfere with its widening of the opinion rule.

The reader may want to know just why some of these decisions were made. I am aware that this narration is long on the facts of what happened, and short on the explanation behind them. Much of the reason for this is that I can only reflect the contents of the decisions printed in the historical records. Undoubtedly judges often think a certain precedent was intended to be interpreted flexibly, or that the facts of the particular case somehow merit such interpretation. But the tendency usually is to write the decision so as to imply that the precedent is perfectly and straightforwardly applicable to the role it is being made to perform.

Surely the principal reason for the decisions we have seen was not the state of the precedents but the prevailing social atmosphere. Precedents only provide the excuse, strong or feeble, for doing what the court thinks society demands at the given time. And what society, or at least its powerful elements, demanded in early America was to favor sellers. To me the trend is best summed up in Walton Hamilton's statement that caveat emptor served well its two masters, business and justice.[24]

That is a barbed statement, possibly unfair if interpreted to imply a lack of ethics on the part of the law in 19th Century America. What Hamilton meant, however, was that the law was faithfully supporting the prevailing social ethic of the time. That ethic was that business could do no wrong.

After Medbury v. Watson the rules for opinion and value statements might seem to have been stretched about as far as they could toward favoring sellers. But the philosophy of "anything goes" was still impeded by the requirement that the buyer must be capable of checking the seller's claim for himself. Falsity, even fraudulent falsity, in non-factual statements was perfectly acceptable up to that point, but not beyond. Do you think the full-blooded sellerists felt hampered by that? Maybe they did, because it wasn't long before another Massachusetts case got rid of that "impediment" and settled everybody down to an even greater degree of good old-fashioned lying. In Brown v. Castles of 1853 the court added the following twist to the rule that deliberate misrepresentations beyond the observation of the recipient amounted to fraud. The rule, it said, was inapplicable under certain conditions because it:

> "is not applied to statements made by sellers, concerning the value of the thing sold, former offers for it, &c., it always having been understood, the world over, that such statements are to be distrusted. Multa fidem promissa levant [Many promises lessen confidence]."[25]

All buyers know to distrust these kinds of statements! Therefore there is no harm if the seller is deliberately false in speaking them, and it also doesn't matter (this is what goes beyond the earlier law) that the buyer has no chance to check them himself. He would never want to check such claims himself because he rejects them automatically to begin with. Nothing is needed in law to protect the buyer because he protects himself. Holy sellerism!

All of that may be quite logical and a reasonable extension of the rules as long as you accept the beginning premise. You have to believe that no buyer would trust

a seller's claim about something's quality or value. If you can accept that, you can believe everything else. But can you accept it? I certainly cannot. I don't think that many people, in the last century or in this one, automatically distrusted such claims. Nor should they have--some of such claims were true, after all. Why would people be accustomed to automatic distrust when some of the sellers they dealt with were honest? The rule of course is utterly foolish if the basic premise is wrong. It would mean that anyone who trusted a seller's false value claims would be told he's out of luck because such claims are not fraudulent because nobody trusts them. How is that for logic!

There is an extenuating circumstance, actually, which makes the Brown v. Castles rule seem a bit less foolish. What the judge probably meant was that all those people who act reasonably and sensibly would automatically distrust opinion statements. A few people who behaved unreasonably might trust them, but such people would be negligent under the law and therefore not eligible for its protection. Remember Baily, who let his horses die from an overload? Such people are beyond the law's cognizance, so when the judge said it's always understood that such statements are to be distrusted he meant it's understood by all those persons whom the law considers itself obligated to protect.

That logic may be a bit better, but it's still not without its problems. How did the law decide that it's reasonable to automatically distrust opinion statements which you can't check personally? The law itself prior to that time said no such thing. It said that if the buyer can't check personally, then fraudulent behavior was punishable. That meant the buyer was invited legally to trust the seller (not in the sense that the seller would necessarily be honest, but that the buyer at least would be protected if he were not).

But the court in Brown v. Castles decided that false opinions which can't be checked independently by the buyer should be immune from punishment even though

stated fraudulently, because a reasonable person wouldn't believe such statements anyway. The matter clearly is open to differences of opinion, of which mine is that a large proportion of the public has always been inclined to trust or at least not to automatically distrust such statements. I am certain it is too large a group to call them all unreasonable.

The concept of reasonableness was later expressly identified in the common law as the "reasonable man standard." This standard was not mentioned in Brown v. Castles, but it's likely that the court was implying the existence of such a notion. The words of the case taken literally, however, stated that absolutely all persons (not just reasonable ones) distrust statements of a thing's value.

The point was to be repeated eloquently in later cases. Look at these words from an 1887 Massachusetts case: "The law recognizes the fact that men will naturally overstate the value and qualities of the articles which they have to sell. All men know this, and a buyer has no right to rely on such statements.[26] Two years later the same Massachusetts court, ever a friend to the seller, made the point again in Deming v. Darling.[27] Deming had purchased a railroad bond on representations that the railroad was good security and the bond was the very best and safest, an "A No. 1" bond. It wasn't, and Deming took the matter to court. The defendant's counsel requested the trial judge to instruct the jury that the statements were expressions of opinion no one might rightfully rely on. Such instruction would have been in line with precedents such as Medbury v. Watson, but the judge chose to ignore that line of thinking. He instructed the jury that the representations "so far as they were expressions of opinion, if made in good faith...would not support an action of deceit." In other words, the trial judge thought opinion statements made in bad faith should be called fraudulent.

The jury found Darling liable accordingly, but appeal to the Supreme Judicial Court of Massachusetts brought a reversal stated by Justice Oliver Wendell Holmes:

> "The language of some cases certainly seems to suggest that bad faith might make a seller liable for what are known as 'seller's statements'...Pike v. Fay, 101 Mass. 134. But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to differences of opinion...and as to which 'it has always been understood, the world over, that such statements are to be distrusted,' (Brown v. Castles...)..."

Holmes was undoubtedly the most famous of puffery's judicial godfathers, these words having been oft-quoted for their emphasis and eloquence. He added some explanation for why he thought the rule was a good one:

> "The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value, when the expectation has been disappointed."

Another eloquent figure was the famous Judge Learned Hand of the Second Circuit Court of Appeals, who offered in 1918 a similar defense of the idea that "everyone" knows enough to distrust opinion statements:

> "There are some kinds of talk which no man takes seriously, and if he does he suffers from his credulity...Neither party usually believes what the seller says about his opinions, and each knows it. Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relationship to objective truth."[28]

With statements such as these the rule from Brown v. Castles was virtually carved into stone. There was no doubt in the law's mind that "all" people, at least all reasonable ones, put no reliance whatever into statements of opinion or value. Perhaps they could investigate the truth, but they were thought to distrust seller's opinions and puffs whether they could investigate or not.

The result is a rationale for puffery today which actually flaunts the original reason for excusing false opinions. When the exemption from liability originated it was based on the premise that the individual could examine for himself; it did not apply where he could not. But the rule today is based not on the individual's opportunity to examine for himself, but on his supposedly natural tendency to disbelieve

automatically if he is a reasonable person.

The latter is a significantly different type of proposition. Rather than being based on a norm, on something which people should do, it is based upon a fact about what they presumably do do. Any such rule stands in a precarious position to the extent that the fact it claims about people's behavior may be incorrect. Where reasonable people rely upon puffery and are deceived by it, it would be absurd to call their action unjustified on the reasoning that they wouldn't have done that in the first place. Another measure of the rule's absurdity is that it calls for the consumer to distrust automatically items of puffery which may in fact be true. Investigation, when possible, would enable a person to separate the true puffs from the false ones, but automatic distrust prevents him from ever making such a reasonable discrimination.

But we have seen what happened. The contemporary attitude toward puffery precisely reflects the treatment established by Brown v. Castles.[29] It is best seen in the "official comment" appended to Section 542 of the Restatement of Torts.[30] Section 542 ostensibly restricts opinion statements by stating conditions under which the recipient may rely on them, for example when the speaker purports to have special knowledge or expertise which the recipient does not have. This would seem to offer buyers considerable protection from sellers, but it turns out that a separate standard applies in the marketplace which makes the law different there than it is in other areas of human endeavor. Here is what the authors of the Restatement have added as "official comment" in explanation of Section 542:

> "Comment on Clause (a): f. ...The ordinary purchaser of jewelry cannot be expected to know the quality or value of the gems shown him by a jeweler. He must rely and is therefore justified in relying upon the jeweler's statement that a diamond is of the first water and, after making allowance for the natural tendency of a vendor to puff his wares, he is justified in relying upon the jeweler's statement of the value of the gem."[31]

Consider the difference this qualification makes. If your lawyer offers you his

opinion that one way of writing your will is better than another, you have a right to rely on his opinion because of his special knowledge. But if a jeweler tells you a diamond is worth so much or has certain superior qualities, you may rely on his opinion only to the extent of assuming it will not go beyond the "natural tendency" to puff. Don't be misled, therefore, by what may appear to be your legal right to rely on the jeweler because he's an expert. You may do that, yes, but only to a restricted degree.

Imagine you go to a jeweler and listen to his opinion about a diamond. Recalling the rule, you remind yourself that you must ignore that part of his opinion which is the puff, but you may rely on that part which is not the puff. How can you be expected to do that? Suppose, for example, that the diamond was known in the jewelry industry, by a consensus of experts, to be worth $100. Suppose, too, that the jeweler tells you it is worth $150. How are you to determine how much of that opinion is acceptable puffing and how much is not? Would it be only puffing if the jeweler said it was worth $125, but more than puffing to state any higher price?

What sort of protection is offered to buyers by a rule which outlaws not exaggeration but merely too much exaggeration? Doesn't Section 542 amount, really, to a sellout to puffery? Notice how it places legal puffing ahead of illegal fraud--that is, the first part of the exaggeration is the puffing part which the buyer is told he must accept as legal. To get any protection, the buyer must show that the exaggeration has gone further than that, which must be a very difficult thing to do.

Here is more of the "official comment" upon Section 542 which the authors of the Restatement of Torts have supplied:

> "d. ...Thus the purchaser of an ordinary commodity is not justified in relying upon the vendor's opinion of its quality or worth...
>
> "e. This is true particularly of loose general statements made by sellers in commending their wares, which are commonly known as

> 'puffing,' or 'sales talk.' It is common knowledge, and may always be assumed, that any seller will express a favorable opinion concerning what he has to sell; and when he praises it in general terms, without specific content or reference to facts, buyers are expected to and do understand that they are not entitled to rely literally upon the words..."[32]

No question remains that the handling of opinion statements gives little comfort to consumers. Though the law reflected in Section 542 is instrumental in controlling misrepresentations elsewhere, for consumers it is nothing more than a concession to the traditional sellerist use of false opinions and puffs. It mirrors perfectly the Massachusetts cases of the 19th Century. Caveat emptor may be dead in most senses, but in the land of opinions it thrives as strongly as ever in the 20th Century.

The same status quo attitude is evident in the interpretation of Section 539 of the Restatement, which states that opinions may be held fraudulent by their associations with incompatible facts. Again, it is illusory to believe that this means what it seems to say in regard to marketplace transactions. The following is included in the "official comment" to #539:

> "c. The habit of vendors to exaggerate the advantages of the bargain which they are seeking to make is a well recognized fact. An intending purchaser may not be justified in relying upon his vendor's statement of the value, quality, or other advantages of a thing which he is intending to sell as carrying with it any assurance that the thing is such as to justify a reasonable man in praising it so highly. However, a purchaser is justified in assuming that even his vendor's opinion has some basis in fact, and therefore in believing that the vendor knows of nothing which makes his opinion fantastic."[33]

So there we are! In the marketplace the buyer is not justified, as he would be elsewhere, in believing that the facts known by the seller are compatible with the opinion. The buyer must understand that they may be incompatible, and that the only prohibition is that they may not be fantastically incompatible. The uncertainty created is similar to saying that the puffery may exaggerate some, but not too much. The jeweler's claim that a $100 diamond is worth $125 is incompatible with the facts, but

perhaps not unreasonably so. Possibly a claim that the diamond is worth $150 would be fantastically incompatible. Again, how do we determine such things?

What about the possibility that every opinion statement implies the fact that the speaker sincerely believes it? No doubt a true-blue sellerist would say it wouldn't be fantastically incompatible for a seller to say his product was worth so much, or was best or most popular, when he didn't believe it. That would be incompatible only to an ordinary degree. So much for sincere belief in the marketplace.

All of these developments sadly recall the comment of Oliver Wendell Holmes that "The standard of good faith required in sales is somewhat low."[34] No better commentary can be made on the state of good faith in buying and selling than to compare the light touch of Sections 539 and 542 upon the marketplace against the more solid impact these rules have upon other dealings. Why should not the correct rules for the market be the same as those applied elsewhere--being, in other words, what is literally cited in Sections 539 and 542, omitting the added comments.

To retain the added comments which recognize puffery is to retain the law's incorrect beliefs--straight out of caveat emptor--that the consumer knows to distrust these statements and so declines to rely on them, and does not need them in any event because he is able to check the truth personally. These assumptions simply are not true as general descriptions of consumer behavior. The obvious answer is to look and see what people really think and do.

The answer, too, is to look and see what the sellers really think and do. They go along publicly, of course, with the law's assumption that puffery deceives no substantial portion of the public. Yet I know of a strong reason for arguing that puffery is believed by much of the public, and the reason is precisely that advertisers and salesmen use it all the time. It is endemic in American salesmanship, practically the soul and substance of the American way of selling. Selling goods is one of the most expert acts ever developed on our continent, and experts don't repeat methods which

fail! When experienced professionals commit themselves to a wide use of puffery, it can only be from the knowledge that it will sell. And when law and advertiser thus disagree over whether these messages work, one should ask who is the greater expert at determining what sells products! The industry's conviction that puffery works is proof enough for me that it does, because I have a great admiration for the expertise of the advertising profession.

The law, I must conclude, has no right to argue that puffery is acceptable because it doesn't work. That rationale declined when most of caveat emptor declined, and there is no justification in maintaining it to support the remnants of caveat emptor which remain under the name of puffery. Caveat emptor is mostly dead, and it deserves today to be entirely dead.

FOOTNOTES

1. I have described the caveat emptor rule in great detail in The Great American Blow Up--Puffery in Advertising and Selling, to be published by the University of Wisconsin Press in 1974 or 1975. See particularly Chapter 4, "The roots of sellerism."
2. P. 226 (1967).
3. 317 F.2d 669, 674 (2d Cir., 1963).
4. 302 U.S. 112, 58 S.C. 113 (1937).
5. The other four types will not be discussed here, but see The Great American Blow-Up.
6. But see The Great American Blow-Up.
7. Yelverton 21, 80 Eng. Rep. 15 (1602).
8. Y.B. 42 Ass. 259, pl. 8 (1367); Dale's Case, Cro. Eliz. 44, 78 Eng. Rep. 308 (1585); and see discussions of Baily v. Merrell and Pasley v. Freeman in text below.
9. Yelverton's report, dated Mich. 44 and 45 Eliz., was brief probably because it was merely a description by counsel of an earlier case, from Mich. 39 Eliz. This was noted by Justice Buller in Pasley v. Freeman.
10. 3 Bulst. 94, 81 Eng. Rep. 81; Cro. Jac. 386, 79 Eng. Rep. 331 (1615).
11. Ibid., Cro. Jac. 387: "...and it was a matter which lay in his own view and conusance; and if he doubted of the weight thereof, he might have weighed it; and was not bound to give credence to another's speech; and being his own negligence, he is without remedy: as where one buys an horse upon warranting him to have both his eyes, and he hath but one eye, he is remediless;...The whole Court was of that opinion: although it was said, that there was apparent fraud here in him who affirmed." The ruling was based on the so-called obvious falsity rule.
12. 1 Lev. 102, 83 Eng. Rep. 318 (1663).
13. This other report was labeled "Leakins v. Clissel," but is the same case: 1 Sid.

146, 82 Eng. Rep. 1022 (1663). "Land or jewels," the court explained further, "have more value to one man than to another, but otherwise is rent or other things certain, because the value is knowable and measurable to all."

14. 3 T.R. 51, 3 D. and E. 51, 100 Eng. Rep. 450 (1789).

15. Rolle's Abridgment of the Leading Cases and Theories of the Common Law, Vol. 1, 101, pl. 16 (1668).

16. Vernon v. Keys, 12 East 632, 637, 104 Eng. Rep. 246, 249 (1810).

17. "To make an affirmation at the time of sale a warranty, it must appear by evidence to be so intended; (Buller, J., 3 D. & E. 57; Carth. 90; Salk. 210;) and not to have been a mere matter of judgment and opinion, and of which the defendant had no particular knowledge." Seixas and Seixas v. Woods, 2 Caines (N.Y.) 48 (1804). The portion prior to the parentheses referred to Buller's references to Crosse v. Gardner, 90 Eng. Rep. 656 (1689), and Medina v. Stoughton, 91 Eng. Rep. 188 (1700), in which Lord Holt had helped establish the warranty concept. The portion following the parentheses was drawn from Buller's reference to Harvey v. Young. Harvey and Pasley involved fraud, not warranty, and Buller did not discuss the exemption of opinion statements from warranty considerations. Kent's statement, nonetheless, appears to have brought the opinion exemption into warranty law in America.

18. Cochrane v. Cummings, 4 U.S. (Pa.) 250, 1 L. Ed. 820 (1802), tended to disavow the opinion rule by describing as facts what were usually called opinions.

In Gimblin v. Harrison, 2 Ky. 315 (1804), a buyer charged a misrepresentation of land as "second-rate," the land actually being inferior to that description. However, the seller had reported what a third party had said, thus was cleared without a discussion of the possible status of "second-rate" as an opinion statement. "Second-rate" is a "superlative" rarely encountered in American

advertising, but used successfully by Avis to help capture business from the third, fourth, etc., car rental companies rather than from number one Hertz.

In Sherwood v. Salmon 2 Day (Conn.) 128 (1805), Sherwood's counsel argued on behalf of the misrepresentations that "the assertions of the defendant amount to no more than the expression of an opinion." He also argued that the defects were "discoverable by the exercise of due care" and therefore caveat emptor applied. The court decided for Sherwood on the second argument, therefore the first was not discussed. Later review at chancery (equity) rather than at Law, 5 Day (Conn.) 439 (1813), determined that the seller's misrepresentations were of material facts, citing Cochrane v. Cummings, but the earlier decision was not voided.

19. 5 Johns. (N.Y.) 354 (1810).

20. The decision stated: "Per Curiam. There was no express warranty or fraud proved in this case. The plaintiff below purchased the wagon, on sight, and the assertion of the defendant that it was worth more than its real value, furnishes no ground of action. (1 Johns. Rep. 97. 274. 414. 4 Johns. Rep. 228. 4 Johns. Rep. 421.) The judgment below must be reversed." The ruling appears to have been based on the authority of Seixas, note 17, since three of the five cases cited found a basis in that case.

In 1827 Kent cited Davis along with Harvey and Baily in support of a similar rule: "A mere false assertion of value, when no warranty is intended, is no ground of relief to a purchaser, because the assertion is a matter of opinion, which does not imply knowledge, and in which men may differ. Every person reposes at his own peril in the opinion of others, when he has equal opportunity to form and exercise his own judgment." 2 Commentaries on American Law 381, 1st ed. In his second edition, 2 Commentaries 485 (1832), Kent added to the

above the following: "Simplex commendatio non obligat" [Mere recommendation does not bind]. No source was cited.

Kent apparently sided with Buller (Pasley, note 14) in feeling the opinion exemption should not apply when the opinion was stated falsely. His statement above is reminiscent of Buller, and the comment directly following it is even more so: "If the seller represents what he himself believes as to the qualities or value of an article, and leaves the determination to the judgment of the buyer, there is no fraud or warranty in the case." In support of this statement Kent cited Jendwine v. Slade, 2 Esp. Rep. 572 (1797).

21. 6 Metcalf (Mass.) 246 (1843).

22. This was dictum applying to statements between sellers and buyers; the actual decision went against the misrepresentor because he was a third party.

23. 3 Allen (Mass.) 380 (1862).

24. "The ancient maxim caveat emptor," 40 Yale Law Journal 1133, 1186 (1931).

25. 11 Cush. (Mass.) 348 (1853). The decision continued: "And there are other cases, in which it is held that an action will not lie, when he who sustains damage from a false affirmation might, by ordinary vigilance and attention, have ascertained that the statement on which he acted was false. See Harvey v. Young, Yelv. 21; Baily v. Merrell..."

26. Kimball v. Bangs, 144 Mass. 321, 11 N.E. 113 (1887). See also Gordon v. Parmelee, 2 Allen (84 Mass.) 212 (1861); Parker v. Moulton, 114 Mass. 99 (1873); Bishop v. Small, 63 Me. 12 (1874). Bishop included this twist on the usual explanation as to why value statements should be exempt: "It is not so much that such representations are not enough to amount to fraud and imposition, but that they are, so to speak, too much for that purpose. Most of them are too preposterous to believe..."

27. 148 Mass. 504, 20 N.E. 107 (1889).

28. Vulcan Metals v. Simmons, 248 F. 853 (2d Cir., 1918).

29. Though what it described here is the common law, the treatment of puffery by the Federal Trade Commission is not significantly different. The FTC fought puffery originally, but was forced to accept it by appeals court reversals which invoked the common law precedents. A full description of the FTC's handling of deception may be found in The Great American Blow-Up.

30. Restatement of Torts (Second), Tentative Draft No. 10 (1964).

31. Sec. 542. Little has been said about the buyer's role, but the assumption at law apparently is that the buyer will just as routinely make counter-statements which "blow down" the object which the seller is blowing up. No name has been given to this process of deflating.

32. Ibid.

33. Section 539, Restatement of Torts (Second), Tentative Draft No. 10 (1964).

34. Burns v. Lane, 138 Mass. 350 (1885).